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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 312.

JOSEPH ZANZONICO,
Petitioner,

vs.

MICHAEL ZANZONICO, Individually, and as Executor of Antonio Zanzonico, CARMELA ZANZONICO, and T. R. REALTY COMPANY,
Respondents,

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENTS.

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TABLE OF CONTENTS.

	PAGE
Argument	1

Table of Authorities.

Fay v. *New York*, 332 U. S. 261, 288	2
Lynch v. *New York*, 293 U. S. 52, 54	1
Twining v. *New Jersey*, 211 U. S. 78	2
Waterworks Equipment Co. v. *McGovern*, 96 N. J. Eq. 520, aff'd 98 N. J. Eq. 701	2
Williams v. *Kaiser*, 323 U. S. 471, 477	1
New Jersey Constitution, 1947, Art. VI, Sec. III	3
Revised Statutes of New Jersey 2:29-9	2

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The New Jersey Supreme Court affirmed on the opinion of the New Jersey Court of Chancery. The report appears in 2 N. J. 309.

ARGUMENT.

I. No federal question was raised in the New Jersey courts. A careful examination of the record fails to show that any point of federal law was even suggested to the courts below for their decision. On this ground alone the petition for certiorari must be dismissed. The rule is clear. *Lynch* v. *New York*, 293 U. S. 52, 54; *Williams* v. *Kaiser*, 323 U. S. 471, 477.

II. The petitioner was not deprived of any right to a jury trial. The Seventh Amendment, which is cited in the

petition and brief, of course has no application whatever to the courts of a state. *Fay* v. *N. Y.*, 332 U. S. 261, 288; *Twining* v. *N. J.*, 211 U. S. 78. If the Seventh Amendment be supposed to govern state as well as federal courts, still the present petitioner brought his action in an equity court where it belonged. He sued to foreclose a mortgage in New Jersey's former Court of Chancery. He did insert a demand for a jury trial in his answers to the counter-claims (record, pp. 25a and 28a). Before it went out of existence in September, 1948, the New Jersey Court of Chancery was subject to a statute (R. S. 2:29-9) providing: "If any question ordinarily determinable at law and requiring a jury trial, arise in a suit of which the court of chancery has jurisdiction, a jury trial, if required, may be ordered, but shall be deemed to be waived unless demanded in the pleadings * * *." A line of cases held that the ordering of a jury trial was discretionary, but aside from that, the present petitioner, if he had wanted a jury, should have made an affirmative application to the Court. *Waterworks Equipment Co.* v. *McGovern*, 96 N. J. Eq. 520, affirmed 98 N. J. Eq. 701. Neither before nor at the trial was the Court of Chancery asked to rule upon the jury trial demand which had been inserted in the present petitioner's answers to the counter-claims. He went to trial without objection and presented his evidence to the court without a jury.

An attempt is also made to base a constitutional objection on the fact that the trial judge heard the entire case without referring any part of it to a master. Whether a reference had been anticipated or not, no objection was offered during the course of the trial that the reference was not made.

By New Jersey standards the case was in all respects tried in a proper manner.

III. The case is not important to anyone except the parties. This will be obvious upon reading the opinion of the trial judge which was adopted by the New Jersey Supreme Court (r. p. 82, *et seq.*) If there had been irregularities at the trial important enough to suggest a need to correct them for the future, that would now be academic. The New Jersey Court of Chancery went out of existence on September 15, 1948. Today a similar case would be tried before a court having jurisdiction to give both legal and equitable relief in the same cause. New Jersey Constitution, 1947, Art. VI, Sec. III. New Jersey practice has changed greatly and any ruling which this court might make concerning the lack of a jury trial in this case and the failure to make a reference to a master would have little, if any, possible application to procedures now being followed.

It is respectfully submitted that the petition for certiorari should be denied.

WARD J. HERBERT,

ARTHUR J. CONNELLY,
Counsel for Respondents.